Copyrights and copywrongs

Why the government should embrace the public domain

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Abstract

The traditional justifications for copyright no longer hold good in the digital era, and what we're seeing now is copyright maximalism, which is harming access to knowledge and freedom of expression. The Indian government should, at the very least, relinquish government copyright and place all government works in the public domain.

Each of you reading this article is a criminal and should be jailed for up to three years. Yes, you. "Why?" you may ask.

Have you ever whistled a tune or sung a film song aloud? Have you ever retold a joke? Have you replied to an e-mail without deleting the copy of that e-mail that automatically added to the reply? Or photocopied pages from a book? Have you ever used an image from the Internet in presentation? Have you ever surfed the Internet at work, used the the 'share' button on a website, or retweeted anything on Twitter? And before 2012, did you ever use a search engine?

If you have done any of the above without the permission of the copyright holder, you might well have been in violation of the Indian Copyright Act, since in each of those examples you're creating a copy or are otherwise infringing the rights of the copyright holder. Interestingly, it was only through an amendment in 2012 that search engines (like Google and Yahoo) were legalized.

Traditional justifications for copyright

Copyright is one among the many forms of intellectual property rights. Across differing theories of copyright, two broad categories may be made. The first category would be those countries where copyright is intended to benefit society, the other where it is intended to benefit the author. Within the second category, there can again be two subcategories: those that see the need to benefit the author due to notions of natural justice and those that see the need to provide incentives for authors to create. Incentives to create are necessary only when the act of creation itself is valuable (and more so than the creator). The act of creation is valued highly as it directly benefits society. Thus, it is seen that

the second sub-category is closer to the societal benefit theory than the natural justice sub-category. In the United States, the wording of the Progress Clause makes things clear that copyright is for the benefit of the public, and the author is only given secondary consideration. It is in light of this that the U.S. Supreme Court said,

> "The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."

Economic theories of copyright see copyright as an incentive mechanism, designed to encourage creators to produce material because they would be able to recover costs and make a profit due to the exclusionary rights that copyright law grants. Thus, the ideal period of copyright for any material, under the economic theory would be the minimum period required for a person to recoup the costs that go into the production of that material. Allowing for the great-grandchildren of the author to benefit from the author's work would actually go against the incentive mechanism. Even if the author is motivated enough to put in even more hard work to provide for her great-grandchildren, her children, grandchildren, and great-grandchildren wouldn't have any incentive to create for themselves (as the incentive is seen purely in terms of economics, and not in terms of creative urge, etc.), as they are already provided for by copyright. Thus, in a sense, the shift towards longer periods of copyright terms that we are seeing today can be seen as a shift from the incentive-based model to a rewards-based model of copyright.

The other standard theory of copyright justification is the natural rights theory, which deems intellectual property the fruit of the author's labour, thus entitling them to complete control over that fruit. This brings us to the conception of property itself, and the Lockean and Hegelian justifications for personal property is what is most often used to back such an argument up.

There are many problems with the natural rights theory of intellectual property. If that theory were to hold water, copyright law would accord greater precedence to authors than to publishers. Yet, we see that it is publishers primarily, and not authors, who get benefit of copyright. The "work for hire" doctrine, embodied in Section 17 of the Copyright Act, holds that it is the employer who is treated as the owner of copyright, not the author. This plainly contradicts that natural rights theory. And it also raises the question of why we should protect certain kinds of knowledge investments in the first place. Publishing is a business, and all risks inherent with other businesses should come along with publishing. There is no reason that the State should safeguard their investment by vesting in them a right while safeguarding the investments of any other business only occasionally, and that too as an act of munificence. This problem arises because of the free transferability of copyright. This leads us to the larger problem, which is of course that of treating knowledge as a form of property. Property, as we have traditionally understood it, has a few features like excludability. Knowledge, however, does not share that feature with

property. Once you know something that I created, I can't exclude you from that knowledge that (unlike my ability to take back an apple you have stolen from me). This analysis also has the pernicious effect of excluding free speech analysis of copyright laws. An incorrect analogy is often drawn to explain why free speech analysis doesn't work on property: you may wish to exercise your right to free speech on my front lawn, yet the State may decree that I am in full right to throw you off my property, without being accused of abridging your right to freedom of speech. So, the argument goes, enforcement of property rights is not an affront to freedom of speech. The problems with this analogy are obvious enough: the two forms of "property" cannot be equated. If you take the location of speech away, I can still speak. If, on the other hand, you restrict my ideas/expression, then I can no longer be said to have the freedom of expression.

One size doesn't fit all

It is easy to see that copyright is an ill-fit for all the things that it now covers. Copyright in its present form is a historical accident, which evolved into the state it is in a very haphazard fashion. It is a colonial imposition on developing countries. It does not value that which we often value in Indian culture: tradition. Instead, copyright law values modernity and newness. It can also be seen as a trade issue imposed on us through the Trade-Related Intellectual Property Agreement (TRIPS Agreements) as part of the World Trade Organization.

Importantly, copyright is not a single well-planned scheme. In some cases — for literature, visual art works, lyrics, musical tunes, etc. — it provides rights to the artist, while in other cases — for recordings of those musical tunes, and for films — it provides rights to the producers. What are the legal reasons for this distinction? There aren't any; the distinction is a historical one (with sound recordings and films getting copyright protection after literature, etc.). At one point of time only exact copies were governed by copyright law. Hence, translations of a work were considered not to be infringement of that work (or a "derivative work"), but new independent works, since after all it takes considerable artistic effort to create a good translation of a work. However now even creating an encyclopedia based on Harry Potter (as the Harry Potter Lexicon was), is covered as infringement of the exclusive rights of the author. At one point of time photographs were not provided any copyright, being as they are, 'mere' mechanical reproductions. They were seen as not being 'creative' enough. However, around the turn of the twentieth century, that position changed, and hence every photograph you've taken of your dog is now copyrighted. According to a recent Supreme Court decision, merely adding paragraph numbering to court judgments is considered to be 'creative' enough to merit copyright protection! At one point of time, copyright existed for 14 years. Now, with the international minimum being "fifty years after the death of the author", it lasts for an average of more than a century! Once upon a time, copyright was only granted to those who wanted it and applied for it. That has now changed, and you have copyright over every single original thing that you have ever written, recorded, or otherwise affixed to a medium.

Copyright in the digital era

All digital activities violate copyright, since automatically copies are created on the computer's RAM, cache, etc. Because now everything is copyrighted, and copyrighted seemingly forever, each one of us violates copyright on a day-to-day basis. It is a mockery of the law when everyone is a criminal. The US President Barack Obama violated copyright law when he presented UK's Queen Elizabeth II an iPod filled with 40 songs from popular musicals like West Side Story and the King and I. When even presidents, with legal advisers cannot navigate copyright law successfully, what hopes have we ordinary people?

There is no shortage of similar examples to show that copyright law has gone out of control.

Take extradition, for instance. Augusto Pinochet was extradited, Charles Shobraj was sought to be extradited. Added to their ranks is the pimply teenager who runs TVShark, who British courts have cleared for extradition to the USA for potential violation of copyright law. The extreme injustice of copyright is easily observable if one sees the contorted map depicting net royalty inflows available on Worldmapper.org: there are a sum total of less than a dozen countries which are net exporters of IP; all other countries, including India, are net importers of IP. IP law is one area where both those who talk about social justice and those who talk about individual liberties find common ground in the monopolistic or exclusionary rights granted under copyright law. Copyright acts as a barrier to free trade, thus allowing Nelson Mandela's autobiography to be more expensive in South Africa than the United Kingdom because South Africa is prohibited by the UK publisher from importing the book from India. Mark Getty, the heir to the Getty Images fortune, once presciently observed that "IP is the oil of the 21st century".

Government copyright

In the ivory towers of academia, there has in recent times been a clarion call that's resounding strongly: the call for open access. As the Public Library of Science states, "open access is a stands for unrestricted access and unrestricted reuse". Why is it important? "Most publishers own the rights to the articles in their journals. Anyone who wants to read the articles must pay to access them. Anyone who wants to use the articles in any way must obtain permission from the publisher and is often required to pay an additional fee. Although many researchers can access the journals they need via their institution and think that their access is free, in reality it is not. The institution has often been involved in lengthy negotiations around the price of their site license, and re-use of this content is limited." Importantly, the writers of articles (scholars) do not get paid by the publishers for their articles, and most developing countries are not able to afford the costs imposed by these scholarly publishers. Even India's premier scientific research agency, the Council for Scientific and Industrial Research, recently declared that the costs of scientific journals was beyond its means.

Why is this important? Because apart from establishing the idea of informational equity and justice, it also establishes the idea that taxpayer-funded research (as most scientific and much of academic research is) ought to belong to the public domain, and be available freely. This principle, seemingly uncontro-

versial, is very unfortunately not embodied in the Indian Copyright Act. Most public servants do not realize that that which they create may not be freely used by the public whom they serve.

Under the Indian Copyright Act, all creations of the government, whether by the executive, judiciary, or legislature, is by default copyrighted. This does not make sense under either of the two theories of copyright that we examined above. The government is not an 'author' who can have any form of 'natural rights' over its labour. Nor is the government incentivised to create more works if it has copyright over them. Most of the copyrighted works, such as various reports, the Gazette of India, etc., that the government creates are required to be created, and the cultural works it creates are for cultural promotion and not for commercial exploitation. Hence it makes absolutely no sense to continue with the colonial regime of 'crown copyright', when countries like the USA have suffered no ill effects by legally placing all government works in the public domain.

While there are a limited set of exceptions to government copyright provided for in the law, those are very minimal. This means that even though you are legally allowed to get a document through the Right to Information Act, publicising that document on the Internet could potentially get you jailed under the Copyright Act. This is obviously not what any government official would want. If instead of the four sub-sections that form the exception, the exception was merely one line and allowed for "the reproduction, communication to the public, or publication of any government work", then that itself would elegantly take care of the problem. This would also remove the ambiguities inherent currently in the Data.gov.in, where the central government is publishing information that it wants civil society, entrepreneurs, and other government departments to use, however there is no clarity on whether they are legally allowed to do so.

Recently, the member states of the World Intellectual Property Organization passed a treaty that would facilitate blind persons' access to books. On that occasion, at Marrakesh, I noted that intellectual property must not be seen as a good in itself, but as an instrumentalist tool which may be selectively deployed to achieve societally desirable objectives. I said: It is historic that today WIPO and its members have collectively recognized in a treaty that copyright isn't just an "engine of free expression" but can pose a significant barrier to access to knowledge. Today we recognize that blind writers are currently curtailed more by copyright law than protected by it. Today we recognize that copyright not only may be curtailed in some circumstances, but that it must be curtailed in some circumstances, even beyond the few that have been listed in the Berne Convention. One of the original framers of the Berne Convention, Swiss jurist and president, Numa Droz, recognized this in 1884 when he emphasized that "limits to absolute protection are rightly set by the public interest". And as Debabrata Saha, India's delegate to WIPO during the adoption of the WIPO Development Agenda noted, "intellectual property rights have to be viewed not as a self contained and distinct domain, but rather as an effective policy instrument for wide ranging socio-economic and technological development. The primary objective of this instrument is to maximize public welfare." When copyright doesn't serve public welfare, states must intervene, and the law must change

to promote human rights, the freedom of expression and to receive and impart information, and to protect authors and consumers. Importantly, markets alone cannot be relied upon to achieve a just allocation of informational resources, as we have seen clearly from the book famine that the blind are experiencing. Marrakesh was the city in which, as Debabrata Saha noted, "the damage [of] TRIPS [was] wrought on developing countries". Now it has redeemed itself through this treaty.

The Indian government needs to similarly redeem itself by freeing governmental works, including the scientific research it funds, the archives of All India Radio, the movies that it produces through Prasar Bharati, and all other taxpayer funded works, and by returning them to the public domain, where they belong.